IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 72-1574

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

VS.

BOB LAWRENCE REALTY, INC., et al,
Defendants-Appellants.

PETITION FOR REHEARING

Comes now the Appellants, Bob Lawrence Realty, Inc., and Bobby L. Lawrence and moves this Court to grant this Petition for Rehearing filed in support of its application for certiorari and for grounds thereof shows the following:

This petition for rehearing shows to the Court that not only have these applicants been subjected to an imprecise and unclear standard for their conduct but every real estate company operating in this country has no guideline whatsoever by which it can regulate the conduct of their agents or by which they can determine whether or not they are in violation of this

law. Part of the reason for this is the fact that the several orders of the District Court are contradictory and part of the reason is the fact that the approach argued for by the government is contrary to every principle of law used to establish liability.

I. THE DECISIONS OF THE DISTRICT COURT ARE THEMSELVES CONFLICTING AND CONTRADICTORY ON THE DEFINITION AND APPLICATION ON WHAT CONSTITUTES A "PATTERN OR PRACTICE"

The District Court for the Northern District of Georgia has issued three orders in this case and in the related *Ray Mitchell* case:

(A) *U.S. v. Mitchell* (327 F.Supp. 476). This was the first of the three decisions and it established these principles:

> (1) A "pattern or practice" violation is not ". . . merely an isolated, unusual, and unintentional occurrence." (p. 483)
>
> (2) Before the real estate broker (principal) can be held liable for the acts of the individual real estate salesman (agent) under the principles of respondent superior there must be a showing of a willful act on the part of the principal, or, at the very least, "a showing of consciousness that the act is going on or a showing of acquiescence or conscious indifference." (p. 485) (Relevant portions of this opinion are reproduced as Appendix I to this Petition for Rehearing).

(B) *U.S. v. Bob Lawrence Realty, Inc.* (327 F.Supp. 481) which holds:

> (1) The definitions and tests of *Ray Mitchell* (above) were adopted. (p. 489)

(2) "The Court concludes that no Section 3613 pattern or practice has been established on the part of defendant, Bob Lawrence, acting individually. This defendant Lawrence's motion for summary judgment is granted as to this claim." (p. 490)

(3) The Court rejected the government's contention that a group pattern or practice could be shown simply by a similarity of actions. Rather, the Court specifically stated that a group pattern or practice could only be proven by showing ["(T)he pattern or practice must be one on the part of the group acting as a unit. This would require, at the very least, a showing of some coordination of effort on the part of the defendants. Any less standard would provide the Attorney General with enforcement powers over the isolated acts of individual defendants acting independently of each other, merely because these persons' acts coincide in time and place with the acts of other violators."] (p. 493) (Relevant portions of this opinion are reproduced as Appendix I to this Petition for Rehearing).

Up to this point, the Appellant has no quarrel with the rulings of the District Court. It is the third order passed (*U.S. v. Lawrence*, et al, 335 F.Supp. 1004) which we contend is contradictory to the two previous orders. In this third order the District Court found that individual acts of real estate companies coinciding "in time or place with other violators" were sufficient to constitute a "group" pattern or practice, and that the coincidence in time and place ". . . establishes the necessary 'concert' of action . . ."

It must be remembered that the government has always conceded that there was never any principle of law such as conspiracy, respondent superior, interlocking person-

nel, or any other act, conscious or unconscious to tie these various defendants to one another aside from the single fact that they all did business (independently of one another) in the same geographic location.

Also of some note is the fact that the very evidence relied upon by the District Court to find that the Appellant had participated in a group pattern or practice of illegal activities (335 F.Supp. 1004 at 1006, n. 2) was the same evidence relied upon by the District Court in finding that he had not engaged in any individual pattern or practice of discrimination (327 F. Supp. 487 at 489, 490).

II. BY RETREATING FROM THE CONCEPT THAT A GROUP PATTERN OR PRACTICE REQUIRES SOME CONCERT OF ACTION WITH KNOWLEDGE BY THE INDIVIDUAL MEMBERS OF THE GROUP MEANS THAT THE INDIVIDUALS HAVE BEEN DENIED DUE PROCESS

The Government argued from the first that a group pattern or practice could be established by showing only the *cumulative* effect of all of the defendants' action. This point may be perhaps the most important point in the entire case, and this point alone would justify the grant of certiorari to establish to just what extent liability can attach to members of the real estate industry (operating independently of others) for the acts of those others.

We contend that to hold a defendant liable for the acts of other real estate companies when the defendant has no knowledge of and does not in any way act in concert with the other real estate companies must be a prima facia denial of due process, as it attaches lia-

bility without any fault on his part and without any opportunity to take any steps to protect himself.

The real estate broker cannot know what steps to take or how to take any such steps in order to escape any "group pattern or practice" dragnet. He has no contact with, knowledge of, or control over the operations of any other real estate companies.

The District Court's last opinion and its findings of facts are most illustrative on this point. The District Court was impressed by the activities of many real estate companies in this area, most of whom were never named as defendants. However, the *cumulative* effect of all real estate activities in this area clearly seemed to control the conclusions found by the District Court. Also, the conclusions found by the District Court were general conclusions dealing with *all* effects felt in the neighborhood by *all* homeowners, and *all* activities of all real estate companies. There is no specific findings of what these specific defendants did or how they were related to each other or to the final result. Instead, the Court looks to and determines what the final cumulative result is and then concludes that the individual defendants are part of a group pattern or practice because their individual efforts contributed in some way to the final cumulative result.

This was a reversal of the rule pronounced earlier by the District Court:

> "The pattern or practice must be one on the part of the group acting as a unit. This would require, at the very least, a showing of some coordination of effort on the part of the defendants."
> (327 F.Supp. 487 at 493)

We respectfully submit that the demands of due process will not allow liability to attach based on a deductive application of the cumulative result approach. Rather, the method of determining liability must proceed from an analysis of the alleged illegal acts themselves.

In no other way can a real estate operator protect himself and take the necessary steps to comply with the law.

Thus, the District Court has used two different standards of determining liability in this case, and these two standards are contradictory and inconsistent. In the two early orders, the District Court stated that a real estate company would be in violation of the Act only if the defendant consciously acted in coordination with other real estate companies, and it was these joint activities which would make a "pattern or practice."

However, in its last order the District Court found liability after expressly finding that there was no coordination of effort with any other real estate company and after expressly finding that the acts alleged against this defendant's salesman was an isolated, unusual, and unrepeated instance.

No real estate company can in any way reasonably structure its business operations in such a way as to be certain it is not in violation of the law under this last decision. This aspect of the case makes this case of widespread general importance having impact and effect in every state upon every real estate company.

III. THE CASE IS NOT MOOT

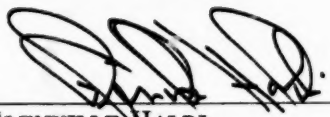
Originally this case was decided in December of 1971, and the injunctive period was to extend through De-

cember of 1973. In a subsequent unpublished opinion, the period of the injunction has been extended through December of 1975. Hence, there is no element of mootness to this decision under review in this case.

IV. THE CASE DOES NOT REQUIRE AN EXAMINATION OF THE EVIDENCE

The matters raised in the application for certiorari do not require a transcript of the evidence. They are all based on rulings of the District Court, uncontroverted facts, and admissions of the Government.

Respectfully submitted,



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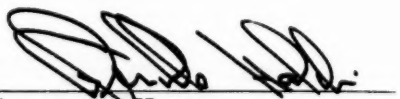
CERTIFICATE OF COUNSEL

I, GLENVILLE HALDI, of counsel for the Appellants, Bob Lawrence Realty, Inc., and Bobby L. Lawrence do certify that this Petition for Rehearing is presented in good faith and not for the purpose of delay and I further certify that the Petition for Rehearing is presented in accordance with Rule 58 of this Honorable Court.

This 23rd day of October, 1973.



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CERTIFICATE OF SERVICE

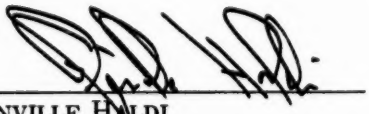
I certify that I have this date, according to Rule 33 of the Rules of the Supreme Court of the United States, served counsel for the United States of America with three copies of the Petition for Rehearing herein by depositing same in the United States mail, with adequate first class postage addressed to:

Carl W. Gabel
Housing Section
Office of David L. Norman
Asst. U.S. Attorney General
United States Department of Justice
Washington, D. C. 20530

and

The Solicitor General
Department of Justice
Washington, D. C. 20530

This 2nd day of November, 1973.



GLENVILLE HALDI
Attorney for Defendants-Appellants

APPENDIX A

IN THE

United States District Court

NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

UNITED STATES OF AMERICA VS. RAYMOND C. MITCHELL, d/b/a RAY MITCHELL REALTY	)	CIVIL ACTION NO. 13467

ORDER

EDENFIELD, District Judge.

This is a "blockbusting" case brought by the Attorney General pursuant to 42 U.S.C.A. § 3613 alleging Defendant Ray Mitchell Realty Company has violated the provisions of 42 U.S.C.A. § 3604(e) and seeking an injunction to prohibit further violations. Defendants have moved for summary judgment on the following grounds:

(1) The acts alleged by plaintiff are not prohibited representations within the meaning of 42 U.S.C.A. § 3604(e);

(2) The acts alleged do not indicate a sufficient basis for the initiation of this suit by the Attorney General under either of the alternatives of 42 U.S.C.A. § 3613;

(3) The representations allegedly made by defendants are exempt from the operation of § 3604(e) by § 3603(b) (1);

(4) The defendants did not have the necessary intent to violate the Act;

(5) The Attorney General is barred from maintaining this action by the doctrine of laches; and

(6) Injunctive relief in this case would constitute an unconstitutional prior restraint on defendants' right to speech.

Defendants' primary contention on their motion for summary judgment is based on both the statutory limits on the Attorney General's right to initiate an action pursuant to 42 U.S.C.A. § 3613 and on the definition of prohibited acts in 42 U.S.C.A. § 3604(e). First, defendants contend that most of the representations alleged by plaintiff do not constitute prohibited representations under § 3604(e) which provides:

> " * * * [I]t shall be unlawful –
>
> "(e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, or national origin."

Secondly, defendants argue that even if the alleged acts were violations of the Act, the Attorney General may not proceed under the so-called "first alternative" of 42 U.S.C.A. § 3613 [1] because the acts are not suffi-

[1] The Attorney General may bring a civil action when he has reasonable cause to believe "that any person or group of persons is engaging in a pattern or practice of resistance to the full enjoyment of any of the rights granted by this subchapter." 42 U.S.C.A. § 3613.

cient in number to constitute the "pattern or practice" of resistance that is a requisite to the Attorney General bringing an action under the "first alternative." Defendants contend the Attorney General may not proceed under the so-called "second alternative" of 42 U.S.C.A. § 3613 [2] because the plaintiff has not alleged acts which deny to groups of persons rights guaranteed by the Act. Because material issues of fact remain concerning all of these issues, summary judgment is denied. * * *

Defendants' second basic contention is that the acts and words attributed to defendants' salesmen do not constitute the "pattern or practice" required by the so-called "first alternative" of 42 U.S.C.A. § 3613 as a requisite for the Attorney General initiating this action. Defendants argue that the words "pattern or practice" were placed in § 3613 to limit the Attorney General's interference to those cases in which the resistance to rights guaranteed by the Act is part of a repeated widespread practice and policy of a particular defendant. The government argues that the "pattern or practice" limitation must be construed narrowly. The government would interpret the section as allowing intervention by the Attorney General in those cases in which it could be shown that the actions of defendant's agents "happened in the regular procedure followed by the defendant."

Before determining the motion for summary judgment, this court must attempt a definition of the "pat-

[2] The Attorney General may bring a civil action when he has reasonable cause to believe "that any group of persons has been denied any of the rights granted by this subchapter and such denial raises an issue of general public importance." 42 U.S.C.A. § 3613.

tern or practice" limitation in § 3613. The most obvious place to look for guidance is in the proceedings and debates of both houses of Congress when the bodies were considering the Act. The Civil Rights Act of 1968 was passed in the days following the assassination of Dr. Martin Luther King, and in the midst of the "poor peoples' march" on Washington, D. C. The "open housing" amendment was added by the Senate to H.R. 2516, a house antiriot bill altering the provisions of 18 U.S.C.A. §§ 241, 245. The Congressional Record reveals little real discussion of the provisions of the Senate's open housing amendment. The amended bill was referred back to the House and the House approved the Senate amendments without referring the matter to a conference committee. Consequently, the proceedings are not enlightening concerning the meaning of "pattern or practice." Apparently the only judicial construction of the statute that has been reported is the construction by the court in *United States v. Mintzes;* 304 F.Supp. 1305 (D.Md.1969). In *Mintzes* the Court held that the defendant real estate companies had been engaged in a "pattern or practice" of resistance. The Court said:

> "In the present case defendants made unlawful representations to the owners of three properties. In several instances the representations were repeated during a long interview and reiterated in subsequent telephone conversations. They were not made *accidentally or as isolated instances,* but were made intentionally and deliberately as part of an effort to assemble a group of properties for an apartment house. The evidence before the Court indicates *a disposition on the part of defendants to use racial representations in circumstances where it appears that such representations may be effective in inducing the owner to sell.*" 304 F.Supp. at 1314.

The focus of the Court in *Mintzes* seemed to be on whether the representations were isolated instances or recurring acts. The *Mintzes* Court also considered the construction by the Fifth Circuit in United States v. Mayton, 335 F.2d 153, of a similar "pattern or practice" provision in the Civil Rights Act of 1960, 42 U.S.C.A. § 1971(e).[3] In *Mayton* the Fifth Circuit has interpreted the "pattern or practice" language in the 42 U.S.C.A. § 1971(e) as follows:

> "The words 'pattern or practice' were not intended to be words of art. No magic phrase need be said to set in train the remedy provided in § 1971(e). Congress so understood them. And the legislative history reflects the adoption of the approach epitomized by Deputy Attorney General Walsh before the House Judiciary Committee:
>
> " 'Pattern or Practice have their generic meanings. In other words, the court finds that the discrimination was not an isolated or accidental or peculiar event; that it was an event which happened in the regular procedures followed by the state officials concerned.' Hearings Before the House Committee on the Judiciary on H.R. 10327, 86th Cong., 2d Sess. 13." 335 F.2d at 158-159.

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[3] Subsection (e) provides as follows: "In any proceeding instituted pursuant to subsection (c) of this section in the event the court finds that any person has been deprived on account of race or color of any right or privilege secured by subsection (a) of this section, the court shall upon request of the Attorney General and after each party has been given notice and the opportunity to be heard make a finding whether such deprivation was or is pursuant to a pattern or practice. If the court finds such pattern or practice, any person of such race or color resident within the affected area shall, for one year and thereafter until the court subsequently finds that such pattern or practice has ceased, be entitled, upon his application therefor, to an order declaring him qualified to vote, upon proof that at

No doubt, the government draws its interpretation of "pattern or practice" from the quote above. . . .

The "pattern or practice" provisions involved in 42 U.S.C.A. § 1971(e) and 42 U.S.C.A. § 2000e-6(a) involve limitations on the Attorney General's enforcement powers just as the provisions in § 3613 involved here. The meaning of "pattern or practice" in § 3613 would seem quite similar to the meaning in the statutes discussed above. Here the government argues that intervention by the Attorney General should be allowed if it can be shown that a prohibited representation occurred in the regular procedures of the defendant. But under the quoted language this is not enough. Clearly, a representation could occur in the regular procedures of the defendant and still be isolated (*Mintzes*, testimony of Humphrey and Walsh, *supra*), accidental (*Mintzes; Mayton*), unintentional (*Mintzes*), or unusual (testimony of Walsh). Under these authorities the Attorney General would have to show on the contrary that representation was repeated (*Mintzes*, testimony of McClelland and Humphrey), intentional and deliberate (*Mintzes*), usual (testimony of Walsh), and that the conduct of the defendant showed a disposition on its part to use such representations where and when they would appear to be effective.

These questions also pose some others: In how many

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any election or elections (1) he is qualified under State law to vote, and (2) he has since such finding by the court been (a) deprived of or denied under color of law the opportunity to register to vote or otherwise to qualify to vote, or (b) found not qualified to vote by any person acting under color of law. Such order shall be effective as to any election held within the longest period for which such applicant could have been registered or otherwise qualified under State law at which the applicant's qualifications would under State law entitle him to vote."

areas did the defendant operate? How many of them were transitional areas? Was its manner of doing business (advertising, for example) the same in all areas? How many agents (salesmen) does the defendant have? What percentage of these salesmen made representations? Did the defendant know or learn of the representations made by his salesmen? If so, what did he do to correct the situation?

Properly administered, this is a good law. Those charged with the administration of its injunctive features, however, including the courts, must bear certain things in mind; otherwise overenforcement could easily become tyranny. Dealing in real estate is a legitimate business. It is well to bear in mind, also, that real estate agents did not invent racial or religious prejudice, and that they neither can nor should be prohibited from carrying on their business in a transitional neighborhood merely because such prejudices exist there—provided always that they obey the law. At the same time, what can and should be prohibited and, in the view of the court, what this law seeks to prohibit, are the actions and purposes of those economic vultures who either deliberately, carelessly, or repeatedly prey upon the fears and prejudices of homeowners for profit.

All of this puts a very heavy burden on all concerned with this law. First, it puts a heavy burden on those in charge of real estate offices in choosing and supervising their salesmen, in cautioning them about their conduct and the requirements of this statute, and in taking prompt and effective action to insure that if an isolated violation does occur, it does not recur. Second, the Act places a heavy burden upon the government and its administrators to make sure before seeking a

sweeping injunction that the spirit of the Act has really been violated and that the proof in every case shows a real pattern or practice in violation of the Act and not merely an isolated, unusual, and unintentional occurrence. Finally, the determination of each such case by the court requires a discriminating judgment, not the mere application of an automatic formula or a rule of thumb. Scarcely ever, therefore, in the view of this court, can such a case be decided summarily or without a full trial with all its nuances, where all the circumstances and credibility of each witness can be weighed and correct inferences drawn. For all of these reasons the motion for summary judgment on the pattern or practice issue will be denied.

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APPENDIX B

IN THE

United States District Court

NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA VS. BOB LAWRENCE REALTY, INC., BOBBY L. LAWRENCE, president; D. L. STOKES AND COMPANY, INC., PETER M. LYNCH, president; MRS. FRANCES HEIMERICH, d/b/a EARL JACKSON REALTY COMPANY; REEVES AND REEVES, INC., FRED J. REEVES, president; and MRS. RUTH STANLEY, d/b/a STANLEY REALTY COMPANY	CIVIL ACTION NO. 13468

ORDER

In this blockbusting case brought pursuant to 42 U.S.C.A. § 3613, the government bases its complaint on three claims. The first two are based on the so-called "first alternative" of 42 U.S.C.A. § 3613 which allows the Attorney General to bring an action when he "has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any rights granted"

by the Fair Housing Amendment to the Civil Rights Act of 1968. First, the government argues that the acts of the several defendants, considered cumulatively, constitute action by a group of persons engaged in a pattern or practice of resistance to rights granted by 42 U.S.C.A. § 3604(e). Second, the government alleges that the acts of the various defendant realty companies, considered individually, constitute a prohibited "pattern or practice" on the part of each of the defendants. The third claim of the complaint is based on the so-called "second alternative" of 42 U.S.C.A. § 3613 which allows the Attorney General to bring an action in any case in which he has reasonable cause to believe "that any group of persons has been denied any of the rights granted by this subchapter and such denial raises an issue of general public importance. . . ." Under this alternative the Attorney General alleges that defendants have denied to groups of homeowners, rights granted by 42 U.S.C.A. § 3604(e) [1] and that this denial raises an issue of general public importance. Defendants D. L. Stokes and Bob Lawrence have moved for summary judgment, and the case is presently before the court for consideration of these motions.

Before considering the motions individually some standards should be set out. In *United States v. Ray Mitchell Realty Co.*, Civil Action No. 13467, Jan. 27, 1971, this court indicated its approach in identifying a prohibited "representation" within the meaning of § 3604(e) and a "pattern or practice" within the mean-

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[1] Section 3604(e) of Title 42 U.S.C.A. provides: "For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, or national origin."

ing of § 3613. In considering whether an act constituted a § 3604(e) representation this court said it would look to all the surrounding circumstances and apply a sort of "reasonable man" standard. The test would be whether a reasonable man, under all the circumstances, would regard the acts and words of the defendant as constituting an inducement to sell his home because members of a minority group were moving into the neighborhood. Of course the inducement would have to be made for profit. In defining "pattern or practice" this court said that the Attorney General must show that the defendants had a definite inclination to make prohibited representations in those areas where the representation would be effective. The court indicated that in order to establish this definite inclination, the Attorney General must show that the prohibited representations were more than a mere isolated occurrence; rather, he must show recurring acts of unlawful representation. The approaches developed in *Ray Mitchell* regarding the § 3604(e) representation and the § 3613 pattern or practice will be applied in this case.

The court will first consider defendants' motions in the context of the government's claim that each defendant's individual actions constitute a pattern or practice or prohibited § 3604(e) representations. The government's case against Defendant Bob Lawrence is based on three allegedly prohibited representations made by Mrs. Doris Hammond and Mr. Wayne Murrison to residents of Juanita Street in Southeast Atlanta. (Plaintiff's Answer to Lawrence's Interrogatory No. 2.) The affidavits and depositions filed create issues of fact concerning whether the acts and words of agents Hammond and Murrison were § 3604(e) representations. In many cases, these factual issues would pre-

clude summary judgment. However, in the case of Defendant Lawrence, the crucial question is whether the government's allegations, even if true, show a definite inclination on the part of Defendant Lawrence to make prohibited representations in those cases in which the representations would be effective. It is to this pattern or practice determination that the court directs its attention.

Historically, the main area of concentration of Bob Lawrence Realty has been an area of Atlanta that is now transitional. Bob Lawrence Realty did not move into the area after the transition from white to black had begun. Rather, Defendant Lawrence's company was active in the area before it ever became "transitional." (Affidavits of Lawrence, Hammond, Murrison.) Indeed, Lawrence's office is located in the transitional area. (Affidavit of Lawrence.) The three representations relied on by the government were made by Agents Hammond and Murrison to three residents of Juanita Street. (Plaintiff's Answer to Lawrence's Interrogatory No. 2.) The representations were made by the agents working together on the same afternoon. (Affidavits of Hammond and Murrison.) None of the three persons contacted were ever contacted again by agents of Bob Lawrence Realty. (Depositions of Brown, Wilmer, and McCrum.) Only one sign of Bob Lawrence Realty had ever been seen in the area. (Deposition of Brown, p. 8.) On the basis of these facts, this court cannot conclude that the government has alleged facts which show a definite inclination on the part of Bob Lawrence Realty to make prohibited representations. Though most of Lawrence's real estate activity has always been in areas that are now transitional, the

government has alleged only three blockbusting representations. These violations were committed by two agents, working together. The representations were made on the same afternoon; there is no indication they were repeated by Agents Hammond or Murrison, or any other agents of Bob Lawrence. When compared with Bob Lawrence Realty's total activity in the area, the three representations relied on by the government appear to be isolated incidents. The court concludes that no § 3613 pattern or practice has been established on the part of Defendant Bob Lawrence, acting individually. Thus Defendant Lawrence's motion for summary judgment is granted as to this claim.

* * *

The government's second claim is that all of the defendants have done acts which cumulatively amount to a pattern or practice of resistance to rights granted by 42 U.S.C.A. § 3604(e). The government contends in its original brief that " [A]ll of the defendants, while operating in Southeast Atlanta and DeKalb County have engaged in one general pattern or practice of resistance to the full enjoyment of rights secured by 42 U.S.C.A. § 3604(e). Nor does this mean that the several defendants consciously conspired to engage in any particular activity. The substance of the complaint is that individual defendants, during the same period of time made unlawful representations to residents of the same general area for the same purpose–profit–and predictably, with the same results. . . . [O]ur burden under 42 U.S.C.A. § 3613 can be met by a demonstration at the trial that the cumulative efforts of all the defendants' unlawful activities contributed generally to the alleged resistance to federal law." Defendant D. L.

Stokes argues that the government cannot prove its pattern or practice case under 42 U.S.C.A. § 3613 by simply cumulating the activities of several defendants.

In determining whether the acts of various individual defendants may be cumulated to constitute a group pattern or practice, the court must first attempt a "plain meaning" interpretation of the statute. A literal reading of § 3613 reveals no requirement that the government allege and prove a conspiracy in order to bring an action against several defendants. What the statute does require is that the Attorney General allege and prove a prohibited pattern or practice of activity on the part of a person, in the case of an action against a single defendant, or a prohibited pattern or practice on the part of a group, if the action is brought against a group collectively. In an action brought against a group, the "plain meaning" interpretation of the statute indicates that it is the action of the group as a unit that must constitute a pattern or practice.[5]

This plain meaning interpretation must now be tested against the purpose of the statute as revealed in the legislative history and in the interests the statute was intended to affect. The legislative history of the section is not enlightening.[6] Consequently, neither party has

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[5] This interpretation seems evident upon analysis of the clause involved. "Person" and "group" are correlatives. The phrase "of persons" following "group" is a prepositional phrase identifying the content of the group. The statute provides an either/or situation. If either a person or a group is involved in a pattern or practice, the Attorney General may initiate an action.

[6] The original bill passed by the House did not contain a fair housing provision. The House Bill was considered by the Senate in the days following the assassination of Dr. Martin Luther King and in the midst of the "poor peoples' march" on Washington. The Senate added the fair housing amendment to the

relied on this history as really supporting an interpretation of the statute regarding the issue under consideration. The interests protected by the statute are identifiable. The first four subsections of § 3604 protect the purchaser from various types of discrimination in the selling of homes. Section 3604(e) protects the homeowner from racial and certain other representations made for profit by third parties to induce a homeowner to sell in panic. To protect these homeowner's rights, Congress has prohibited representations that lead to infringement of the rights. The Act provides three methods of enforcement. A private party may file a complaint with the Secretary of Housing and Urban Development and initiate conciliation procedures which may eventually develop into a court action; a private party may initiate a civil suit directly in the United States district courts or in state courts; the Attorney General may initiate a civil suit in United States district courts. A private party may initiate a civil action if any of his rights granted by §§ 3603, 3604, 3605 or 3606 are violated, including a single § 3604(e) representation. 42 U.S.C.A. § 3612(a). The court may appoint an attorney for the private litigant whose rights have been infringed "in such circumstances as the court may deem just"; and the court may also allow the private litigant to proceed without payment of fees, costs or security. 42 U.S.C.A. § 3612(b). The

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House Bill and sent the amended bill back to the House. In the House, the amended bill was passed via a "unanimous consent" resolution which sent the bill to the President without debate in the House and without a conference regarding the Senate amendment. Nowhere in the legislative proceedings were the issues under consideration here discussed by the legislators. *But see* discussion of somewhat similar provisions of the 1960 and 1964 Civil Rights Acts in *United States v. Mitchell* (N.D. Ga., Jan. 27, 1970) pp. 10-14 (slip opinion).

court may grant equitable relief as well as damages to the private party, and it may allow a prevailing plaintiff to receive court costs and attorney's fees where the private party is not financially able to assume the legal fees. 42 U.S.C.A. § 3612(c). The Attorney General is more limited in the circumstances in which he may initiate an action. He must have:

(1) reasonable cause to believe that

(2) (a) a person or group of persons is engaged in a pattern or practice of resistance to rights granted by the Act

or

(b) a group of persons has been denied rights granted by the Act and such denial raises an issue of general public importance. (42 U.S.C.A. § 3613.)

Under the pattern or practice provision, the Attorney General cannot bring an action for one isolated violation as can a private party. Under the "denial to a group of persons" provision the Attorney General cannot bring an action where only one person has been harmed, as can the private person to whom the prohibited representation was made.

It is important to remember that the above limitations on the Attorney General do not involve the rights of the homeowners damaged by § 3604(e) representations; rather, the limitations relate to the enforcement procedures chosen by Congress. The disagreement between the Attorney General and defendants basically involves a difference in point of view. The Attorney General seems to approach "pattern or practice" from the point of view of the homeowner. The moving defendants approach "pattern or practice" from the point

of view of the realty company. To support the Attorney General's approach, it could be argued quite persuasively that it makes little difference in end result whether one realty company makes a § 3604(e) representation to ten different homeowners on a street or ten different realty companies acting independently each make on § 3604 representation to a different homeowner on the street. The potential end result is the same: panic selling on the part of homeowners, instability in the neighborhood, and ultimate resegregation. Thus, the Attorney General should be allowed to act for the homeowners in either situation. The answer to this argument is that it focuses on the rights rather than the procedure for enforcement of the rights.

Congress has provided two ways for private homeowners to protect themselves in the case of the ten realty companies acting independently. It has also provided for certain financial assistance in bringing the action if the court deems such assistance is proper. Thus the homeowners clearly have remedies for the wrongs committed against them by the ten companies acting independently. The rights must be distinguished from the enforcement procedures.

We conclude that "pattern or practice" must be approached from the point of view of the persons allegedly violating the Act. This was the underlying premise of this court's holding in *United States v. Ray Mitchell Realty*, Civil No. 13467, (Jan. 27, 1971), that a pattern or practice could be shown by proving a definite inclination on the part of the defendant to make prohibited representations in those areas in which the representations would be effective. If the meaning of a group pattern or practice is to be approached from

the defendant's point of view it is not sufficient merely to allege a coincidence of similar § 3604(e) representations by several realty companies in a particular geographical area. While this might be a pattern or practice from the homeowner's point of view, it is not a pattern or practice when viewed from the defendant's standpoint. The pattern or practice must be one on the part of the group acting as a unit. This would require, at the very least, a showing of some coordination of effort on the part of the defendants. Any less standard would provide the Attorney General with enforcement powers over the isolated acts of individual defendants acting independently of each other, merely because these persons' acts coincide in time or place with the acts of other violators. Concerning an isolated violation by a single person acting independently, Congress intended enforcement only by private parties. Should Congress decide that the public interest requires increased enforcement powers for the Attorney General, it may provide them. This court should not.

Defendants Stokes' and Lawrence's motions for summary judgment must now be considered in light of the standard evolved above. None of the affidavits, depositions, or answers to interrogatories show an agreement or conspiracy on the part of the several defendants to do acts violative of § 3604(e).[7] The government's affi-

[7] Interrogatory No. 12 of the government's first interrogatories seems possibly designed to discover acts indicating an agreement or conspiracy or at least a coordination of effort on the part of the several defendants. The interrogatory asks:

> "Please indicate whether or not your company, agents or employees have received any referrals of prospective purchasers or leasees since December 31, 1970, from other real estate companies doing business in the Metropolitan Atlanta area; if affirmative, please supply the following information . . . ".

davits do generally show that the various defendants made representations in the same transitional area of Atlanta during the spring of 1969. (*See*, e.g., Affidavits of McGough, Watson, Springfield, Moreman, Laupheimer.) The depositions indicate that several companies displayed for sale signs in the area under consideration. (*See*, e.g., Deposition of Isabel Wilmer, pp. 10, 25; deposition of Cleo Brown, pp. 7, 12.) The affidavits and depositions also show that the real estate salesmen knew the areas under consideration were transitional. *See* affidavits of Doris Hammond and Wayne Murrison filed in support of defendant Bob Lawrence's motion for summary judgment *and* affidavits of Sara Watson, Marion Coker, Mary Springfield, filed by the government in opposition to defendants' motions. These facts possibly give rise to an inference that the various defendants made a coordinated effort to induce the persons in the transitional areas to sell their homes in panic. For this reason defendants' motions for summary judgment concerning the government's claim of a group pattern or practice must be denied.[8]

Defendants' motions for summary judgment are also addressed to the government's claim under the second alternative of § 3613: "that [a] group of persons has been denied . . . rights granted by this subchapter and such denial raises an issue of general public importance."

Most of the defendants answered this interrogatory in the negative; defendant Stokes did not answer it at all by consent of government counsel. Defendant Lawrence stated it had received referrals from other real estate companies.

[8] Of course on a hearing on the merits, the court may give credence to the inference most reasonably drawn from the facts, rather than draw all inferences against the moving defendants as it must on these motions for summary judgment.

A claim based on this alternative does not involve a pattern or practice. It involves a denial of rights to a group of persons. For the purpose of this motion, Defendant Stokes has admitted that the representations of T. C. Rogers violate the Act. These admissions involve at least six homeowners. In addition the government contends that Agent Betty L. Smith's 213 letters mailed to a transitional area constitute a denial to a group of persons. Issues of fact remain concerning whether those letters constitute unlawful representations, and whether the letters had a significant impact on a "group of persons." These factual issues preclude this court's summary judgment on the issue of whether rights have been denied to a group of persons within the meaning of § 3613. To the extent that defendant Lawrence's motion applies to the government's "denial to a group of persons" claim, that motion is also denied, since factual issues remain concerning whether the § 3604(e) representations were made to at least three homeowners.

Defendants Stokes and Lawrence also contend that even if they have violated the Act in the past, injunctive relief is no longer appropriate because defendants are no longer in violation of the blockbusting prohibitions. Defendants rely on *United States v. W. T. Grant Co.*, 345 U.S. 629 (1953), in which the Supreme Court affirmed a district court's refusal to issue an injunction against violations of § 8 of the Clayton Act. The government had sought an injunction prohibiting interlocking directorates. The defendant resigned from the directorates in question and the district court refused to issue an injunction because it concluded there was not the slightest threat that defendant would attempt

any future activity in violation of § 8. In this case both Stokes and Lawrence have stated in affidavits that they intend to comply with the provisions of the Fair Housing Amendment. This action is brought against several defendants, and one of the government's claims is that the defendants as a group have violated the Act. Until the issue is put to proof, it is difficult to determine exactly what, if any, activities of the defendants are important in effecting a coordinated effort. For instance, the possible significance of the multiple listing service has not been fully developed. Concerning defendants Stokes and Lawrence, the system of referrals from other realty companies has not been fully disclosed. The court concludes that until the record is further developed, neither the propriety nor the form of any injunctive relief regarding defendants Stokes and Lawrence can be determined.[9] Thus defendants Stokes' and Lawrence's motions for summary judgment on the grounds that injunctive relief is no longer appropriate are denied.

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[9] *See also, United States v. West Peachtree Corp.* (5th Cir., Jan. 4, 1970) (slip opinion), where the Fifth Circuit indicated the defendant's good faith and present disposition in a § 3604 case were not determinative concerning whether an injunction should issue.

In summary, the court GRANTS a partial summary judgment for defendant Bob Lawrence Realty on the issue of whether defendant Bob Lawrence Realty has participated in an *individual* pattern or practice of resistance to rights granted by § 3604(e). As to all other issues, the motions of both defendants Bob Lawrence Realty and D. L. Stokes and Company are DENIED.

This 28th day of January, 1971.

/s/ NEWELL EDENFIELD
NEWELL EDENFIELD
UNITED STATES DISTRICT JUDGE

ENTERED JANUARY 29, 1971

APPENDIX C

IN THE

United States District Court

NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

UNITED STATES OF AMERICA VS. RAYMOND C. MITCHELL, d/b/a RAY MITCHELL REALTY	CIVIL ACTION NO. 13467
UNITED STATES OF AMERICA VS. BOB LAWRENCE REALTY, INC. BOBBY L. LAWRENCE, president and MRS. RUTH STANLEY, d/b/a STANLEY REALTY COMPANY	CIVIL ACTION NO. 13468

ORDER

In these "blockbusting" suits in each of which motions for complete summary judgment have previously been denied,[1] the Attorney General originally sought injunctive relief against six Atlanta real estate firms for allegedly engaging, for profit, in a pattern or prac-

[1] *United States v. Mitchell*, 327 F. Supp. 476 and United States v. Bob Lawrence, 327 F.Supp. 487.

tice of inducing or attempting to induce persons to sell or rent their homes by representations regarding the entry or prospective entry into the neighborhoods of persons of a particular race, color, religion or national origin, in violation of the Fair Housing Act of 1968, sections 3604 and 3613 of Title 42 of the United States Code. As part of such actions the government also claimed that the defendants had deprived a group of persons of their rights as guaranteed by that Act. Three of the cases were disposed of by consent before trial and the three remaining cases were tried before the court without a jury on October 4 through 14, 1971.

All of the defendants are real estate brokers licensed by the State of Georgia to engage in the listing and selling of real estate. Each is the sole proprietor of the company bearing his (or her) name.

Defendant Mitchell employs approximately 80 sales persons or agents, about one-half of whom are part-time, the others being regular full-time employees. Defendant Stanley employs 14 agents and Lawrence 27. Each defendant, through its sales people, acts as agent for listing sellers and presents offers (contracts) on behalf of potential buyers, earning commissions from the sellers only when sales are consummated. Almost all such sales involve single-family dwellings. All of the defendants and all agents are white.

The earnings of real estate salesmen are derived from the commissions earned on houses they sell and from no other source. A salesman's earnings increase in direct proportion to the increase in the number of houses he or she sells.

The Mitchell case involves four areas in Southwest

Atlanta known as Heritage Valley, Dixie Pines, Kings Forest, and an area between Campbellton and Beecher Roads. These areas comprise altogether a total of four square miles. The cases against Stanley and Lawrence involve an area in Southeast Atlanta known as the Candler Road-Glenwood-McAfee area.

These areas have been since 1968 considered racially transitional; that is, prior to 1968 the racial occupancy of them was all white, but beginning in 1968 as blacks began moving in whites began moving out. All of the areas are now substantially all black. All of the defendants were aware of this transition.

Virtually all of the testimony in each case came either from housewives now or formerly living in the affected areas or from the defendants and agents themselves.

The evidence at the trial disclosed many illuminating things about what happens in a residential neighborhood when it becomes racially transitional. For example, if these cases are typical – and the court believes they are – the following consequences can be predicted as inevitable and beyond dispute: First, a sense of panic and urgency immediately grips the neighborhood and rumors circulate and recirculate about the extent of the intrusion (real or fancied), the effect on property values and the quality of education. Second, there are sales and rumors of sales, some true, some false. Third, the frenzied listing and sale of houses attracts real estate agents like flies to a leaking jug of honey. Fourth, even those owners who do not sell are merely tempted as their neighbors move away, and hence those who remain are peculiarly vulnerable. Fifth, the names of successful agents are exchanged and recommended between homeowners and frequently the agents are called

by the owners themselves, if not to make a listing then at least to get an up-to-date appraisal. Constant solicitation of listings goes on by all agents either by house-to-house calls and/or by mail and/or by telephone, to the point where owners and residents are driven almost to distraction.

In this maelstrom the atmosphere is necessarily charged with Race, whether mentioned or not, and as a result there is very little cause or necessity for an agent to make direct representations as to race or as to what is going on. On the contrary both sides already know, all too well, what is going on. In short, for an agent to get a listing or make a sale *because* of racial tensions in such an area is relatively easy, whereas the direct *mention* of race in making the sale is superfluous and wholly unnecessary.

It is perhaps for this reason that the evidence here as to direct racial representations by the individual agent is skimpy indeed and is, in the view of the court, insufficient to establish an individual "pattern or practice" against the defendants or either of them.

At the same time what the evidence does establish, by overwhelming preponderance, is a "group" pattern or practice by all agents in the area, both defendants and non-defendants, and that some agent or agents of each of the defendants did knowingly participate in such pattern or practice, at least in some measure or to some degree.[2]

[2] For example: As to defendant Ray Mitchell, prohibited representations were made to Mrs. McCrimmon by agents Wofford and Rick (though both of these agents were either fired by this defendant or resigned long before these suits were filed); to Mrs. Turner and Mr. King by agent Cook; and to Mrs. Galloway by agent McDougall.

The court is further of the opinion that the foregoing finding establishes the necessary "concert" of action to allow the Attorney General to bring this suit and entitled him to an injunction requiring that, in the future, the defendants obey the law.

This would normally dispose of these cases, but in fairness to the defendants and in amelioration of the injunction to be entered the court cannot omit an observation that in at least some instances the agents were more sinned against than sinning. There is clear evidence, for example, that in at least one instance a complaining witness who had listed her house with an agent of one defendant, and who had recommended to other neighbors that they do likewise, became disenchanted with the agent primarily because a black purchaser whom the agent had produced reneged on his purchase contract. She freely admitted from the stand that because of this when the present investigation started she came forward as a witness as to statutory violations solely to "get" the real estate license of one of the defendants if she could do so.

At least two other governmental witnesses testified to their affiliation with a civic group first known as the "Neighborhood Stabilization Committee" and later as "South DeKalb Neighbors." Its object was to stabilize the neighborhood. Meetings were held weekly. One of these witnesses took an examination and became an agent herself simply to find out what could be done

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As to defendant Stanley, prohibited representations were made to Mrs. Hadley by agent Garner and to homeowner Rodgers by agent Rogers.

As to defendant Lawrence, prohibited representations were made to Mrs. Wilmer, Mrs. McCrum, Mrs. Brown, and Mrs. Crews by agents Hammond and Murrison.

under the law. She was thoroughly familiar with the Fair Housing Act and its sanctions. She was party to a number of actions aimed at one of the defendant companies and others operating in the area. For example, on one occasion she put a sign in her yard saying, "Warning – Real Estate Agents shot on sight." On another occasion, as president of her local group, one of these witnesses attended a convention of a national neighborhood group in Dayton, Ohio, and brought home circulars advising homeowners to "encourage agents to make racial representations" in violation of the Act and to "lead the agents on" until a violation of the Act was established. Some 4,000 of these circulars were distributed in her neighborhood.

It also appears that of the defendants' agents making racial representations at least two had been discharged by defendants, for one cause or another, long before these suits were filed.

There was also evidence, undisputed in the record, that two of the three defendants remaining in the cases held meetings with their agents on a daily or weekly basis at which the appropriate sections of the Fair Housing Act were read and discussed and the agents admonished to observe its provisions.

Considering these circumstances and the scantiness of the direct evidence the court must say that it is not overly impressed with the gravity of the individual transgressions of the individual defendants and their agents. It *is* convinced, however, that by a group pattern or practice the neighborhoods involved were, because of the racial transition thereof, harassed almost beyond endurance and that each of the defendants in some measure participated therein. They should there-

fore be enjoined.

It is therefore CONSIDERED, ORDERED AND ADJUDGED:

(1) That the defendants and their agents, employees, successors, and all those acting in concert or participation with them, be and they are hereby permanently enjoined from inducing or attempting to induce any person to sell or rent any dwelling by any explicit or implicit representations regarding the entry into the neighborhood of a person or persons of a particular race, color, religion, or national origin;

(2) a. That the defendants shall instruct each salesman, agent, and employee of the provisions of the Fair Housing Act and of this decree, his obligations and duties thereunder, and that failure to comply with these obligations and duties may result in dismissal or other appropriate action. This instruction shall be given within ten (10) days of the entry of this decree, and thereafter within ten (10) days of hiring of any new salesmen, employees, and agents. The defendants shall secure from each salesman, employee, and agent a signed statement certifying that he understands his obligations and duties not to discriminate against any person on account of race, color, religion, or national origin in relation to the sale or rental of dwellings or the employment of personnel;

b. That the defendants shall conduct all solicitation effort in such a manner so that the types and amount of solicitation activity shall be essentially similar in all areas in which the defendants conduct

business and the defendants shall not conduct a greater amount or a different type of solicitation in areas which are inhabited by Negroes, or partially inhabited by Negroes, than in areas which are not so inhabited;

c. That the defendants shall make a notation on their records to indicate the race of each person who purchases a house, or sells a house, in the course of their business;

d. That the defendants in all of their real estate transactions, shall provide their services without distinctions based on race or color;

(3) That in case of a dispute as to any future charge by plaintiff that this order has been violated by either defendant, the parties, in an attempt to resolve such dispute, shall attempt to conciliate the matter which is the subject of the allegation within 30 days after the other party has been notified of the alleged violation, and a party shall not apply to this court for additional relief or other appropriate relief within such 30 day period, provided that nothing shall prevent a party from applying to the court in the event that the alleged violation is an explicit violation of the order, as found by the court, and the utilization of the procedure described above would result in irreparable injury to the victim of the alleged discrimination; and

(4) That this order shall be effective for a period of two years from this date, provided, however, that for good cause shown, the parties may move this court for an extension or modification of the order, as appropriate, upon giving the other party 30 days

notice prior to moving for such modification or extension.

Representatives of the plaintiff shall be permitted to inspect and copy all pertinent records of the defendants at any and all reasonable times, provided, however, that the plaintiff shall endeavor to minimize any inconvenience to the defendants from the inspection of such records.

In view of the foregoing injunction no ruling is made on the government's further contention that a group of persons has been denied rights under the Act, first because the evidence here, in the view of the court, is not sufficient to raise an issue of general public importance as required by 42 U.S.C.A. § 3604(b), and second, because the individuals affected are each assured of a remedy under 42 U.S.C.A. § 3612 in any event.

The court retains jurisdiction of this action for all purposes.

IT IS SO ORDERED.

This 27th day of December, 1971.

/s/ NEWELL EDENFIELD
NEWELL EDENFIELD
UNITED STATES DISTRICT JUDGE

ENTERED DECEMBER 27, 1971